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# COMMUNITIES TAKE CONTROL OF CRIME: INCORPORATING THE CONFERENCING MODEL INTO THE UNITED STATES JUVENILE JUSTICE SYSTEM

Amanda L. Paye

**Abstract:** Juvenile crime is one of the preeminent concerns of many Western societies today, yet the current retributive styles of justice that purport to “get tough” on youth crime have not been effective. In defiance of the “get tough” rhetoric, and despite the lack of meaningful legislative recognition, communities are adjudicating juvenile cases through alternative programs based on the Restorative Justice theory. Because of the promising effects of Restorative Justice on youth crime, New Zealand and Australia have taken the bold step of restructuring their juvenile justice systems via landmark legislation that incorporates an innovative “conferencing” model. The model is a facilitated mediation in which offenders, victims, families, and community members participate in the resolution of the crime. The United States should follow suit by adopting the elements of the New Zealand and Australian statutes to incorporate conferencing into its juvenile justice system.

## I. INTRODUCTION

In the aftermath, it was called the “School of Death.”<sup>1</sup> On March 25, 1998, two juveniles opened fire on a schoolyard in Jonesboro, Ark., killing four students and one teacher.<sup>2</sup> Each time such an incident grabs headlines, it sparks a debate in politics<sup>3</sup> and in the media about the violence of today’s youth and the problem of juvenile crime.<sup>4</sup> Therefore, the public perceives that America’s young people are growing increasingly violent and that juvenile crime is spinning out of control.<sup>5</sup> This perception has led to an evolution within the juvenile justice system that has shifted the balance away from the system’s original rehabilitative focus toward a retributive system that purports to “get tough on crime.”<sup>6</sup> Although such

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<sup>1</sup> Nadya Labi, *The Hunter and the Choirboy*, TIME, Apr. 6, 1998, at 32.

<sup>2</sup> *Id.*

<sup>3</sup> Charles W. Colson, *Truth, Justice, Peace: The Foundations of Restorative Justice*, 10 REGENT U. L.R. 1, 2 (1998).

<sup>4</sup> *Kids Who Commit Crimes*, NATIONAL ISSUES FORUM 4 (1994) (“There is no question that public concern about crime is driven by fear and that media accounts of sensational crimes are fanning those fears.”).

<sup>5</sup> Jonathan Alter, *Harnessing the Hysteria*, NEWSWEEK, April 6, 1998, at 27; see generally Robert E. Shepard, *How the Media Misrepresents Juvenile Policies*, 12 CRIM. JUST. 37, 39 (1998) (concluding that “more in-depth, balanced reporting in a public journalism context can contribute to the development of more cost-effective and efficient programs for the prevention and treatment of juvenile crime”).

<sup>6</sup> The juvenile justice system was initially created with the protection of youth in mind. It focused on rehabilitation and the needs of the individual offender, and provided a type of “surrogate parent” for kids who were in trouble. See Jennifer M. O’Connor & Lucinda K. Treat, *Getting Smart About Getting Tough: Juvenile*

events are tragic, they do not necessarily represent an accurate picture of the state of juvenile crime in the United States that justifies enacting more and more retributive measures for combating it.<sup>7</sup>

The United States' "get tough" approach exemplifies what is wrong with its juvenile justice system<sup>8</sup> and such measures do nothing more than exacerbate the societal problems leading to crime.<sup>9</sup> Crime has become a state problem rather than a conflict between individuals.<sup>10</sup> Therefore, society has been content to abdicate its responsibility for crime to a state system.<sup>11</sup> In turn, crime has become faceless. Offenders are not accountable to those whom their actions most affect—victims, families, and communities.<sup>12</sup>

In opposition to this shift, many are advocating Restorative Justice<sup>13</sup> as a significant and promising theory of justice.<sup>14</sup> Restorative Justice

*Justice and the Possibility of Progressive Reform*, 33 AM. CRIM. L. REV. 1299, 1303 (1996). However, within the last 20 years, the juvenile justice system has shifted to a more punitive model that mirrors adult courts. See *id.* at 1302-05 (discussing the shift in juvenile justice away from rehabilitation to punishment).

<sup>7</sup> OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEPT. OF JUSTICE, JUVENILE JUSTICE REFORM INITIATIVES IN THE STATES 3 (1997) ("[T]he hyperbole and alarm that surround much of the political posturing and new ['get tough'] legislation obscure a simple fact: Very few juveniles engage in criminal acts, especially violent criminal acts."). According to 1994 Federal Bureau of Investigation's Uniform Crime Report data, about six percent of all juveniles were arrested for some offense and of those arrested, only about seven percent were arrested for a violent crime. *Id.* That means less than one-half of one percent of juveniles were arrested for violent offenses in 1994. *Id.*

<sup>8</sup> See David B. Moore, *Shame Forgiveness and Juvenile Justice*, CRIM. JUST. ETHICS, Winter-Spring 1993, at 3, 6 ("[The] move to reinstate punishment as an end in itself . . . has been seen as a dangerous retrograde step."). An example of controversial "get tough" legislation that perpetuates state control is transfer statutes that require juveniles to be transferred to adult courts when charged with certain crimes when they are of a certain age. See Mark Dowie, *When Kids Commit Adult Crimes, Some Say They Should Do Adult Time*, 13 CAL. LAW. 55, 58 (1993) (discussing the controversy surrounding a proposed California law that would have lowered the age at which a juvenile could be tried for murder in adult court from 16 to 14).

<sup>9</sup> Paul McCold, *Restorative Justice and the Role of Community*, in RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES 85, 86 (Burt Galaway & Joe Hudson eds., 1996).

<sup>10</sup> Gordon Bazemore, *Three Paradigms for Juvenile Justice*, in RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES, *supra* note 9, at 42-44.

<sup>11</sup> McCold, *supra* note 9, at 90.

<sup>12</sup> *Id.*

<sup>13</sup> "Restorative Justice" as a theory of justice was first proposed in the 1980s. Colson, *supra* note 3, at 8. The theory has also been referred to as "transformative justice" or "relational justice." Carol LaPrairie, *Conferencing in Aboriginal Communities in Canada: Finding Middle Ground in Criminal Justice?*, 6 CRIM. L.F. 576, 580-81 (1996) [hereinafter LaPrairie, *Conferencing in Aboriginal Communities*]. One legal scholar described the application of the Restorative Justice theory:

The label restorative justice can be applied to any approach or program within a system of criminal justice that emphasizes the offender's personal accountability to those harmed and the community, in a process in which the victim and community participate directly in determining what the offender should do to make reparation and to [be accepted back into the community]."

John O. Haley, *Crime Prevention Through Restorative Justice*, in RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES *supra* note 9, at 351. See *infra* Part II for a further explanation of the Restorative Justice theory.

defines crime as conflicts between individuals.<sup>15</sup> It recognizes that crime is not only an offense against the state or governmental authority, but it also causes injury to victims, communities, and, even to offenders themselves.<sup>16</sup> Therefore, Restorative Justice seeks to empower those individuals. The theory asserts that the overarching purpose of the criminal justice process should be to repair the injury to all parties<sup>17</sup> through active participation, dialogue, and negotiation.<sup>18</sup>

Since the 1970s, programs that contain elements of Restorative Justice, such as Victim-Offender Mediation ("VOM"),<sup>19</sup> have been implemented in various forms throughout the United States.<sup>20</sup> Despite their growth,<sup>21</sup> these programs have not been able to make a significant impact on the juvenile justice system. Because they lack legislative direction<sup>22</sup> and receive minimal formal funding,<sup>23</sup> they have not gained the legitimacy and recognition that is necessary for their promulgation.<sup>24</sup> Furthermore, by their structure, they do not address all of the needs of the Restorative Justice process, particularly family and community involvement.<sup>25</sup>

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<sup>14</sup> See MARK S. UMBREIT, VICTIM MEETS OFFENDER 2 (1994).

<sup>15</sup> *Id.*

<sup>16</sup> Daniel W. VanNess, *New Wine and Old Wineskins: Four Challenges of Restorative Justice*, 4 CRIM. L.F. 251, 259 (1993).

<sup>17</sup> *Id.*

<sup>18</sup> UMBREIT, *supra* note 14, at 2.

<sup>19</sup> *Id.* at 5

<sup>20</sup> Victim Offender Reconciliation Programs ("VORP") and community mediation programs are similar alternative dispute resolution programs available for disposition of criminal matters. See Mark William Bakker, *Repairing the Breach and Reconciling the Discordant: Mediation in the Criminal Justice System*, 72 N.C. L. REV. 1479, 1483-91 (1994). Although each is unique, these types of alternative dispute resolution programs are typically furnished as an option after offenders have pled guilty to a crime. They are intended to provide an opportunity for victims and offenders to come together in a mediation setting with a trained mediator to work out an agreement, typically for restitution. UMBREIT, *supra* note 14, at 7-9. For the purposes of this Comment, such programs will be generally referred to as VOMs.

<sup>21</sup> It is estimated that there are currently more than 175 VOM programs in existence in North America. Mark Umbreit, & Howard Zehr, *Restorative Family Group Conferences: Differing Models and Guidelines for Practice*, 60 FED. PROBATION 24, 25 (1996).

<sup>22</sup> Marianne McConnell, *Mediation: An Alternative Approach for the New Jersey Juvenile Justice System?*, 20 SETON HALL LEGIS. J. 433, 436 (1996) ("Official statutory support breaks down institutional barriers to mediation, provides necessary guidelines for mediators and secures support by the government; all of which are crucial for the long-term stability of a mediation program."). See Peter S. Chantilis, *Mediation U.S.A.*, 26 U. MEMPHIS L.R. 1031 (1996) for a survey of the status of state alternative dispute resolution programs as of 1996. In 1996, only 24 states had dispute resolution programs serving juveniles. McConnell, *supra*, at 457 (1996).

<sup>23</sup> UMBREIT, *supra* note 14, at 142-43.

<sup>24</sup> See *id.* at 156 (concluding that "victim-offender mediation should be more consistently integrated into the large national network of court-sponsored restitution programs").

<sup>25</sup> Joe Hudson & Burt Galaway, *Introduction*, in RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES, *supra* note 9, at 3.

The United States is not alone in its quest for answers to the problem of juvenile crime. In response to societal dissatisfaction with their juvenile justice systems, New Zealand and several Australian states/territories completely restructured their systems through legislation<sup>26</sup> that emphasizes the role of family and community in addressing wrongdoing.<sup>27</sup> The principles underscoring the new legislation are rooted in the Restorative Justice theory. These principles were incorporated into the framework of their juvenile justice systems through the creation of the "conferencing" model.<sup>28</sup> Conferencing is a facilitated style of mediation that allows an extended group of people (offenders, victims, families, and support persons) to be involved in the resolution of a crime.<sup>29</sup>

Part II of this Comment describes the theory of Restorative Justice. Part III discusses how New Zealand and Australia have infused the conferencing model with Restorative Justice principles and incorporated it into their juvenile justice systems. Part IV examines how adopting the codification of Restorative Justice principles in the conferencing model from New Zealand and Australia will further the goals of juvenile justice in the United States. This Comment concludes that in order to control and prevent crime, United States juvenile justice systems should make a legislative and financial commitment to Restorative Justice by adopting aspects of the conferencing model that advocates believe are critical to the future of young people in the United States—requiring greater accountability of offenders, empowering victims, and involving families and communities.

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<sup>26</sup> New Zealand's change to the conferencing model was primarily in response to public awareness that the laws governing care and treatment of children, particularly juvenile offenders, were inadequate. See Ian Hassall, *Origin and Development of Family Group Conferences*, in FAMILY GROUP CONFERENCES: PERSPECTIVES ON POLICIES AND PRACTICE 17, 23 (Joe Hudson et al. eds., 1996). Concerns were also raised by the Maori, the indigenous tribe of that country, that the justice system was disproportionately affecting youths of that cultural group, which was evidenced by more Maori youths than those of other cultural groups being arrested and processed through the juvenile courts. In an attempt to rectify these problems, the government adopted the conferencing model, which was greatly influenced by Maori dispute resolution traditions. See John Pratt, *Colonization, Power and Silence: A History of Indigenous Justice in New Zealand Society*, RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES, *supra* note 9, at 149-54 (discussing the restoration of Maori cultural principles in the New Zealand youth justice system). In South Australia, the change was a response to concerns about youth crime and the justice system's inability to deal effectively with it. The adoption of the conferencing model was greatly influenced by its success in New Zealand. Joy Wundersitz & Sue Hetzel, *Family Conferencing for Young Offenders: the South Australian Experience*, in FAMILY GROUP CONFERENCES: PERSPECTIVES ON POLICY AND PRACTICE, *supra*, at 112-13.

<sup>27</sup> Umbreit & Zehr, *supra* note 14, at 25.

<sup>28</sup> Although Restorative Justice did not influence the creation of the conferencing model in New Zealand, the theory has helped to "conceptualize and fine tune" the approach. *Id.* at 25.

<sup>29</sup> See generally Wundersitz & Hetzel, *supra* note 26, at 127-32 (describing the conferencing format).

## II. THE THEORY OF RESTORATIVE JUSTICE

When viewed from the context of the current retributive justice systems of many Western countries, Restorative Justice is a radical concept<sup>30</sup> that requires a shift away from the traditional understanding of the goals of justice.<sup>31</sup> Three ideas are fundamental to Restorative Justice: 1) crime is conflict between individuals that results in injuries to victims, communities, and offenders themselves, and only secondarily is a violation against the state; 2) the aim is to create peace in communities by reconciling the parties and repairing the injuries; and 3) the criminal justice process should facilitate active participation by victims, offenders, and their communities to find solutions to the conflict.<sup>32</sup> Restorative Justice achieves these purposes by encouraging offenders to accept responsibility and be accountable for their actions, by involving and empowering victims, and by "reintegrating"<sup>33</sup> offenders back into families and communities.

Restorative Justice models operate by, first, assisting offenders to be accountable—to understand the impact of their actions and to make amends for the harm their actions have caused.<sup>34</sup> Through being involved in the process of resolving the crime, offenders are empowered and are thus more likely to accept responsibility and make reparations.<sup>35</sup> Once offenders become

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<sup>30</sup> Wundersitz & Hetzel, *supra* note 26, at 114. In fact, some Restorative Justice proponents advocate abolishing the current U.S. criminal justice structure. Van Ness, *supra* note 7, at 261-62.

<sup>31</sup> See Bazemore, *supra* note 10, at 42-44 (discussing the paradigm shift required for implementing the Restorative Justice theory within the current U.S. criminal justice system). The U.S. justice system evolved by balancing the goals of rehabilitation, deterrence, incapacitation, and retribution. For a description of each of these goals, see O'Connor & Trest, *supra* note 6, at 1306-09.

<sup>32</sup> Hudson & Galaway, *supra* note 25, at 2.

<sup>33</sup> See generally JOHN BRAITHWAITE, CRIME, SHAME, AND REINTEGRATION (1989). John Braithwaite, an Australian scholar, first described the concept of "Reintegrative Shaming." It explains that, in order to be effective, the justice system of any community must condemn crime and perpetrators must be made to take responsibility for their actions—offenders must be shamed. However, shaming can be either "reintegrative" or "stigmatic." Braithwaite concludes that many current Western justice systems, particularly in the United States, invoke a type of stigmatic shaming which is destructive to society because it is designed to set offenders apart as outcasts. The alternative is reintegrative shaming, which is found most pervasively in the Japanese culture. In order to earn a fresh start, offenders must express remorse for their past conduct, apologize to any victims, and repair the harm that has been done. This type of shaming strengthens society because it gives offenders the opportunity to re-join their communities as law-abiding citizens. See *id.* at 75. Although Braithwaite does not specifically advocate the theory of Restorative Justice, the principles set forth in his reintegrative shaming theory have become the cornerstone for such programs by advocating "personal accountability of offenders, active community involvement, and a process of reconciliation and reaffirmation of the offender. . . ." UMBREIT, *supra* note 14, at 3-5.

<sup>34</sup> Haley, *supra* note 13, at 352.

<sup>35</sup> Thomas Scheff, *Community Conferences: Shame and Anger in Therapeutic Jurisprudence*, 67 REV. JUR. U.P.R. 97 (1998).

accountable, the path is paved for offenders to be welcomed back into the community.<sup>36</sup>

Secondly, Restorative Justice models involve victims in the adjudication of the crime. State-centered systems have relegated victims to a position of powerlessness, yet they are most deeply affected by the crime.<sup>37</sup> Restorative Justice models attempt to rectify this powerlessness by giving victims a voice in the process.<sup>38</sup> Once victims have had the opportunity to work through the effects of the crime and have a role in its adjudication, victims can then "pardon" offenders, which allows the reintegration process to begin.<sup>39</sup>

Finally, Restorative Justice models affect crime on a societal level by building safe communities and breaking the cycle of violence.<sup>40</sup> Encouraging offenders to be accountable for their behavior provides offenders with the best opportunity to become reintegrated as functioning members of society.<sup>41</sup> In addition, by involving community members in the process, conferencing contributes to 'communities' "empowerment and healing"<sup>42</sup> and reconnects them with crime control at a practical level.<sup>43</sup>

### III. HOW NEW ZEALAND AND AUSTRALIA HAVE CODIFIED RESTORATIVE JUSTICE THROUGH THE CONFERENCING MODEL

New Zealand and three Australian state/territories recently enacted legislation<sup>44</sup> that restructured<sup>45</sup> their juvenile justice systems<sup>46</sup> with

<sup>36</sup> Haley, *supra* note 13, at 367.

<sup>37</sup> Bakker, *supra* note 20, at 1494-96.

<sup>38</sup> Umbreit & Zehr, *supra* note 21, at 25. Studies show that participation in traditional VOM programs reduced victims' fears of "revictimization." *Id.* In a study of four VOM programs involving juveniles, before mediation, victims feared revictimization in 25% of the cases; afterward only 10%. Thomas J. Quinn, *Restorative Justice and Prosecution in the Twenty-First Century*, 30 PROSECUTOR 16, 24 (1996).

<sup>39</sup> "The second . . . element [of Restorative Justice] is a reciprocal acceptance of the offender's expression of remorse by those injured, and a willingness to allow the restoration of relationships between the accountable offender and the community; in other words, to pardon." Haley, *supra* note 13, at 352 (comparing the Restorative Justice theory to the Japanese model of justice).

<sup>40</sup> Bazemore, *supra* note 10, at 48-49; Wundersitz & Hetzel, *supra* note 26, at 114 ("[T]hrough such reconciliation and reintegration, community harmony can be restored.").

<sup>41</sup> Bazemore, *supra* note 10, at 42-43.

<sup>42</sup> Umbreit & Zehr, *supra* note 24, at 25.

<sup>43</sup> Bazemore, *supra* note 10, at 54.

<sup>44</sup> See Children, Young Persons and Their Families Act, 1989 (N.Z.) [hereinafter CYPFA]; see Young Offenders Act, 1993 (S. Austl.) available at <<http://www.austlii.edu.au/au/legis/au/legis/sa/>> [hereinafter S. Austl. Act]; see Young Offenders Act, 1994 (W. Austl.) [hereinafter W. Austl. Act]; see Young Offenders Act, 1997 (N.S.W.) available at <<http://www.austlii.edu.au/au/legis/nsw/>> [hereinafter N.S.W. Act].

<sup>45</sup> All of the Acts created a three-tiered justice system. At the first tier is the use of police "cautioning." Conferencing is used as a second-tier diversionary method and a third-tier enhancement to adjudication before a Youth Court. See Wundersitz & Hetzel, *supra* note 26, at 114-16. Through the cautioning alternative, police have the discretion to give a "caution" to offenders, which is essentially a

Restorative Justice influences.<sup>47</sup> New Zealand was the pioneer when it enacted the Children, Young Persons and Their Families Act ("CYPFA") in 1989.<sup>48</sup> The CYPFA effected a revolutionary restructuring<sup>49</sup> of New Zealand's entire youth welfare system<sup>50</sup> and introduced the conferencing model to juvenile justice.<sup>51</sup> Partly due to the success of the New Zealand model,<sup>52</sup> South Australia was the first territory in that country to establish a conferencing model<sup>53</sup> via legislation<sup>54</sup> when it enacted the Young Offenders

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warning. CYPFA § 211; S. Austl. Act § 6; N.S.W. Act § 13-17. This Comment does not advocate adoption of legislation including cautioning provisions, therefore, it will not be discussed. However, it is notable that in the Australian states, nearly 60% of indictable offenses are expected to be dispensed through cautioning. Joy Wundersitz, *Family Conferencing and Juvenile Justice Reform in South Australia*, in *FAMILY CONFERENCING AND JUVENILE JUSTICE: THE WAY FORWARD OR MISPLACED OPTIMISM?* 87, 91 (Christine Adler et al. eds., 1994).

<sup>46</sup> All of the Acts cover offenses committed by "children" who are over 10 years of age and under 18 years of age. CYPFA § 272; S. Austl. Act § 4; N.S.W. Act § 4. The jurisdictional age range is based on the notion that children under the age of 10 cannot commit a criminal act. See S. Austl. Act § 5 ("A person under the age of 10 years cannot commit an offence [sic]"). Although the conferencing model is limited to juvenile justice systems in New Zealand and Australia, it has been advocated to be appropriate for adult offenders. See Frederick W. M. McElrea, *The New Zealand Youth Court: A Model for Use with Adults*, in *RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES*, *supra* note 9 [hereinafter McElrea, *A Model for Adults*].

<sup>47</sup> One New Zealand judge has referred to the new structure as "responsible reconciliation." F.W.M. McElrea, *A New Model of Justice*, in *THE YOUTH COURT IN NEW ZEALAND: A NEW MODEL OF JUSTICE 3* (B.J. Brown & F.W.M. McElrea eds., 1993) [hereinafter McElrea, *A New Model*]. Granted, the restructured systems are not solely "restorative" in focus. Essentially, the Acts created a "restorative justice model" within a structure that retains some aspects of a state-centered focus (which includes police involvement and a Youth Court as the ultimate arbiter). For further discussion, see Wundersitz & Hetzel, *supra* note 26, at 114-15.

<sup>48</sup> See Hassal, *supra* note 26, at 18.

<sup>49</sup> McElrea, *A New Model*, *supra* note 47, at 3 ("[W]e do definitely have a new model or paradigm of justice in New Zealand, and indeed one that turns the old model on its head.").

<sup>50</sup> The CYPFA governs both youth crime and child abuse and neglect cases. CYPFA § 4. For further discussion of how the CYPFA handles child welfare cases, see generally AMERICAN BAR ASSOCIATION, *FAMILY GROUP CONFERENCES IN CHILD ABUSE AND NEGLECT CASES: LEARNING FROM THE EXPERIENCE OF NEW ZEALAND* (1996).

<sup>51</sup> The New Zealand model is referred to as Family Group Conferencing ("FGC"). CYPFA § 2 defines "family group" as:

an extended family, (a) in which there is at least one adult member (i) with whom the child or young person has a biological or legal relationship; or (ii) to whom the child or young person has a significant psychological attachment; or (b) that is the child's or young person's *whanau* [extended family] or other culturally significant recognized group.

*Id.* See CYPFA §§ 245-71 for use of FGCs in the prosecutions of youth offenders in New Zealand.

<sup>52</sup> Wundersitz, *supra* note 45, at 88.

<sup>53</sup> Although Australian models are generally referred to as "family group conferences," the term more appropriately applies to the New Zealand model. Australian adaptations are more accurately referred to as "effective cautioning conferences" or "community accountability conferences." Jenny Barga, *A Critical View of Conferencing*, 28 *AUSTL. & N.Z. J. CRIMINOLOGY* \*1, \*4 (1995), available in LEXIS, Aust Library, Anzic File. Although the New Zealand and Australian conferencing models differ somewhat in their implementation, this Comment uses the term "conferencing" to refer generally to the New Zealand/Australian model. The term will be used to describe the model to the extent that it involves an extended group of individuals (including offenders, family members, victims, and other support persons) who reach agreement as to the disposition of crimes committed by juveniles through a facilitated mediation process.

<sup>54</sup> Wundersitz, *supra* note 45, at 87. Australia was first introduced to conferencing in 1991 in a



Act of 1993.<sup>55</sup> Western Australia enacted its own version of the Young Offenders Act in 1994.<sup>56</sup> New South Wales also followed this movement in 1997.<sup>57</sup> Although the stated principles and objectives of these Acts may differ,<sup>58</sup> their commonality is in their recognition and implementation of Restorative Justice principles.

#### A. *Achieving Accountability of Offenders through Conferencing*

The creation of the conferencing model was a response to societal concerns in New Zealand and Australia that their juvenile justice systems were not effectively dealing with offenders.<sup>59</sup> Therefore, all of the Acts

police department experiment in Wagga Wagga, New South Wales. Umbreit & Zehr, *supra* note 24, at 26. The model, which relied heavily on police officers as facilitators, has come to be known as the "Wagga model" or "police-based model." Bergen, *supra* note 53, at 3. Yet, the Wagga model differs from the model later codified in New South Wales by the Young Offenders Act of 1997. Wundersitz, *supra* note 45, at 100. Reportedly, Victoria and Queensland are evaluating adopting conferencing. Peter Clack, *New South Wales Lifts Leaf from ACT Book on Young Offenders*, CANBERRA TIMES, Apr. 8, 1998, at 3. However, the model has not been adopted for the entire Commonwealth. The Australian Federal Police in the Australian Capital Territory (A.C.T.) are conducting a study of the conferencing model in conjunction with the Australian National University through the Re-Integrative Shaming Experiment ("RISE"). *Id.* See <<http://www.aic.gov.au/links/raise>> for working papers published by RISE detailing these studies.

<sup>55</sup> S. Austl. Act.

<sup>56</sup> W. Austl. Act. In Western Australia, conferences are referred to as "family meetings." Wundersitz & Hetzel, *supra* note 26, at 112. The Act establishes Youth Justice teams for effectuating the purposes of the Act. See Matua Matt Hakiha, *Youth Justice Teams and the Family Meeting in Western Australia: A Trans-Tasman Analysis*, in FAMILY CONFERENCING AND JUVENILE JUSTICE: THE WAY FORWARD OR MISPLACED OPTIMISM?, *supra* note 45. The Western Australia version of the Young Offenders Act is least like the New Zealand conferencing model. Bergen, *supra* note 53, at 4. Therefore, the Western Australia Act will not be analyzed in this Comment. For further discussion of the Western Australia style of conferencing, see Judge Hal Jackson, *Policy and Politics: Two Recent Examples in Western Australia*, 29 AUSTRAL. & N.Z. J. CRIMINOLOGY \*1 (1996), available in LEXIS, Aust Library, Anzjc File.

<sup>57</sup> N.S.W. Act. Because the New South Wales Act was just recently adopted, few commentaries on the model are available. Therefore, conclusions in this Comment rely on analyses primarily from New Zealand and South Australia.

<sup>58</sup> The objectives of the CYPFA include promoting the well-being of children and families by providing for their welfare needs and by ensuring that juveniles who commit crimes are held accountable. CYPFA § 208. The South Australia Act includes as objectives: accountability for offenders, community protection, deterrence, restitution, and strengthening families. S. Austl. Act § 3. The objectives of the New South Wales Act are providing for alternatives of disposition in court for juvenile offenders, efficiency of the juvenile justice system, and providing for accountability of offenders and involvement by victims. N.S.W. Act § 3.

<sup>59</sup> Wundersitz, *supra* note 45, at 88 ("Of greatest concern to the public [in South Australia] was the perception that the system was not dealing effectively with the serious offender or long-term recidivist."); see Gabrielle Maxwell & Allison Morris, *The New Zealand Model of Family Group Conferences*, in FAMILY GROUP CONFERENCING AND JUVENILE JUSTICE: THE WAY FORWARD OR MISPLACED OPTIMISM?, *supra* note 45, at 15 [hereinafter Maxwell & Morris, *The New Zealand Model*] ("Recently it has become apparent in New Zealand, as elsewhere, that the institutionalisation [sic] of large numbers of children and young people is damaging to them, ineffective in preventing delinquency, and quite unjust."). Adopting Restorative Justice ideals was a change that appealed to all political groups. See Christine Alder & Joy Wundersitz, *New Directions in Juvenile Justice Reform in Australia*, in FAMILY GROUP CONFERENCING AND JUVENILE JUSTICE 1, 6-7 (Christine Alder et al. eds., 1994) (describing how conferencing appealed to

encourage accountability for offenders,<sup>60</sup> with the ultimate goal being their reintegration back into their families and communities.<sup>61</sup> Accountability is achieved through the selection of participants in the conferencing process, through the structure of the process itself, and by allowing offenders to make reparations by performing "outcomes,"<sup>62</sup> which are tasks or actions offenders must complete.

### 1. *Role of Other Conference Participants*

Participants in the conference are selected for the purpose of facilitating the restorative aspects of conferencing.<sup>63</sup> Not only is the conference intended to encourage offenders to accept responsibility for their actions, but also to ensure that they are dealt with in a way that will give them the opportunity to develop in responsible, beneficial, and socially acceptable ways.<sup>64</sup> Therefore, with the leadership of the conference coordinator,<sup>65</sup> the Acts allow for active participation by a variety of individuals, including victims, family members, police officers, legal counsel, and other significant individuals.<sup>66</sup>

Conference coordinators are responsible for organizing and conducting the conferences.<sup>67</sup> They also meet with participants prior to the conference in order to help them understand the nature of the proceeding and

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"law and order conservatives," victims' advocates, and youth workers).

<sup>60</sup> For example, the South Australia Act states that "a youth should be made aware of his or her obligations under the law and of the consequences of breach of the law." S. Austl. Act § 3(2)(a). The other Acts contain similar provisions. CYPFA § 4(f)(i); N.S.W. Act § 34(1)(a)(i).

<sup>61</sup> All of the Acts include provisions to encourage offenders to become functioning members of their communities as long as it is consonant with the need for community safety. CYPFA § 208(d); S. Austl. Act § 3(1) and (2)(c); N.S.W. Act § 34(a)(iii).

<sup>62</sup> See *infra* Part III.A.2. for a discussion of "outcomes."

<sup>63</sup> See Carol LaPrairie, *Altering Course: New Directions in Criminal Justice Sentencing Circles and Family Group Conferences*, 28 AUSTL. & N.Z. J. CRIMINOLOGY \*1, \*10 (1995), available in LEXIS, Aust Library, Anzjc File [hereinafter LaPrairie, *Altering Course*].

<sup>64</sup> Trish Stewart, *Family Group Conferences with Young Offenders in New Zealand*, in FAMILY GROUP CONFERENCES: PERSPECTIVES ON POLICIES AND PRACTICE, *supra* note 26, at 66.

<sup>65</sup> The Acts create a position for an individual who is responsible for coordinating the conferences and acting as facilitator. CYPFA §§ 425, 426 (Youth Justice Coordinator); S. Austl. Act § 9 (Youth Justice Coordinator); N.S.W. Act § 60 (Conference Convenor). For the purposes of this Comment, the term "conference coordinator" will be used.

<sup>66</sup> Under the CYPFA, a variety of individuals are "entitled" to attend conferences, including offenders, families, extended families, the Youth Justice Coordinator (conference coordinator), the "informant" (a representative of the police), victims, a youth advocate (a barrister for the offender), a social worker, and a court appointed guardian. CYPFA § 251(a)-(h). The New South Wales Act contains similar provisions as to those who are entitled to attend. N.S.W. Act § 47(1). The South Australia Act simply requires the conference coordinator to invite offenders' guardians, other relatives who may participate "usefully" in the conference, other persons with a close association with offenders, and victims. S. Austl. Act § 10(1).

<sup>67</sup> Stewart, *supra* note 64, at 74.

the importance of their roles.<sup>68</sup> Because of the conciliatory nature of the process, conference coordinators attempt to develop a rapport with participants prior to convening the conference. This process helps all participants to actively participate in a positive and constructive manner.<sup>69</sup>

Victim participation is considered the key to a successful conference.<sup>70</sup> Conferencing creates an environment in which offenders meet victims and hear of the consequences of their actions. This face-to-face meeting personalizes the crime for offenders and fosters remorse and acceptance of responsibility.<sup>71</sup> Consequently, victims then tacitly and, often overtly, forgive offenders by agreeing to an outcome. In addition, victims then become members of the communities who take responsibility for the actions of offenders and help accept them back into society.<sup>72</sup>

Including members of offenders' families, and their extended families, is intended to have several effects. Through their presence, offenders will realize that they have responsibilities to a community of individuals with whom they most closely relate.<sup>73</sup> At the same time, family participation demonstrates to offenders how many people care about them.<sup>74</sup> Providing this support is designed to give offenders the courage to participate in the conference, follow through on their agreements,<sup>75</sup> and, ultimately, choose not to continue the destructive behavior.<sup>76</sup>

The Acts also provide for police representatives to attend conferences.<sup>77</sup> Their primary role is to explain the events that led to the arrest from the perspective of the police, to represent the police in the outcome and, in the absence of victims, to represent victims' interests.<sup>78</sup>

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<sup>68</sup> Wundersitz & Hetzel, *supra* note 26, at 121-22. Although all of the Acts provide for the participation of various individuals, they do so in varying degrees. Under the CYPFA, with the exception of the court-appointed guardian, offenders and families may prevent any of the other "entitled" conference members from attending, including victims. CYPFA § 251(2). In New South Wales, the conference coordinator has the discretion to prevent anyone from attending, besides victims or offenders, who may "frustrate the purpose" of the conference or whose attendance is "not in the best interests" of offenders. N.S.W. Act § 48(3). The South Australia Act does not address preventing members from attending. However, it does provide that the conference coordinator can invite, with permission of family members, those who may provide assistance and support during the conference. S. Austl. Act § 10(2)(d).

<sup>69</sup> Wundersitz & Hetzel, *supra* note 26, at 122.

<sup>70</sup> *Id.*

<sup>71</sup> McElrea, *A New Model*, *supra* note 47, at 7.

<sup>72</sup> *Id.* at 8.

<sup>73</sup> *Id.* at 6.

<sup>74</sup> Stewart, *supra* note 64, at 67.

<sup>75</sup> *Id.*

<sup>76</sup> Scheff, *supra* note 35.

<sup>77</sup> CYPFA § 251(d); S. Austl. Act § 11(1)(d); N.S.W. Act § 47(1)(g) and (h).

<sup>78</sup> Stewart, *supra* note 64, at 70.

All of the Acts state that offenders may have legal counsel present at conferences.<sup>79</sup> Providing for a Youth Advocate to be involved ensures that offenders are advised of their legal rights and are not coerced into an agreement.<sup>80</sup>

The Acts allow a variety of other individuals to attend, particularly those who are culturally significant.<sup>81</sup> Those who attend become a kind of community of support for victims and offenders.<sup>82</sup> They also may remain involved with victims or offenders by providing ongoing moral support or monitoring the completion of the agreement.<sup>83</sup>

## 2. *Structure of Conferencing Promotes Accountability*

The structure of the conference is designed to first empower offenders by providing them with an entitlement to attend and be an active part of the process.<sup>84</sup> Once offenders accept the option,<sup>85</sup> the process provides them

<sup>79</sup> CYPFA § 251(1)(g); S. Austl. Act § 11(4); N.S.W. Act § 47(1)(f).

<sup>80</sup> Stewart, *supra* note 64, at 71.

<sup>81</sup> The Acts include varying provisions for others to be present at the request of offenders or families. CYPFA § 251(1)(o); S. Austl. Act § 10(1)(c); N.S.W. Act § 47(2)(f). For example, in New Zealand, an elder from the community may be invited to attend. Wundersitz & Hetzel, *supra* note 26, at 124. However, this aspect of the Act has been found to be as significant for offenders of European descent (or *pakeha* in New Zealand). Stewart, *supra* note 64, at 67. Participants may be coaches, teachers, or even peers whom offenders respect. *Id.* The Australian Acts allow for other interested members of the community to attend when it will benefit offenders and conference members. S. Austl. Act § 10(2)(c); N.S.W. Act § 47(2)(a). For example, in cases of sex offenses or sexual abuse, families may agree to invite a professional in that field to attend. Wundersitz & Hetzel, *supra* note 26, at 124.

<sup>82</sup> Mark S. Umbreit, & Susan L. Stacey, *Family Group Conferencing Comes to the U.S.: A Comparison with Victim-Offender Mediation*, 47 JUV. & FAM. COURT J. 29, 33 (1996).

<sup>83</sup> *Id.* at 33.

<sup>84</sup> The CYPFA is the most protective of offenders' right to be dealt with through conferencing. It requires that almost all crimes be referred to conferencing at some point in the adjudicatory process, regardless of the number of times offenders have been through the system. CYPFA § 245. It also prohibits the final disposition of a case unless a conference has been convened to "consider ways in which the court might deal with the young offender in relation to the charge." CYPFA § 281. Conferences are not required in a limited number of situations, such as when the Youth Justice Coordinator and family members agree it would serve no purpose. CYPFA § 248(c). In South Australia, the court can order that conferencing be bypassed in the most serious cases. S. Austl. Act § 17(3)(c). The South Australia and the New South Wales Acts allow police officers discretion to refuse to refer offenders to conferences. S. Austl. Act § 7(4); N.S.W. Act § 37(2) and (3). The New Zealand parliament is considering amending its statute to provide some discretion for referrals, recognizing that conferencing is intended to be a "front-end" diversionary method of dealing with offenders rather than one that attempts to deal with "hard core" recidivists. Wundersitz, *supra* note 45, at 94.

<sup>85</sup> The Australian Acts require an admission of guilt from offenders in order to convene a conference. See S. Austl. Act § 7; N.S.W. Act § 36(b). However, the South Australia Act provides that if a youth is referred back to the Youth Court because of a refusal to admit the allegation during conferencing, if the youth is found guilty by the court, the case may be referred back to conferencing for resolution. Wundersitz, *supra* note 45, at 96-97. In contrast, the CYPFA does not require a guilty plea by offenders prior to convening a conference. Under the CYPFA, a conference can be convened when offenders decline to deny their culpability. CYPFA § 246; John Braithwaite, *Thinking Harder About Democratising Social*

with the opportunity to be accountable for their actions. Accountability is achieved through creating a setting in which offenders can become actively involved,<sup>86</sup> recognize the harm their criminal acts caused, and make reparations—all with the support of family and community members.<sup>87</sup>

The format of conferences is not mandated by any of the Acts. In fact, it is deliberately casual and flexible,<sup>88</sup> but it is not intended to be a coercive or adjudicatory forum.<sup>89</sup> Typically, conferences are conducted in three stages. The first is to introduce the participants and to remind offenders of their legal rights.<sup>90</sup> The second involves recitation of the details of the offense, typically by a member of the police. Offenders are then asked to tell the events from their perspective. Victims are then allowed to describe how the crime has affected their lives. At this stage, participants are encouraged to speak freely about the offense and its impact.<sup>91</sup> The third stage involves reaching an agreement on an appropriate outcome.<sup>92</sup>

Although the conference format is flexible, the Acts provide a structure for convening and completing the process.<sup>93</sup> The Acts, in varying degrees, provide for some of the procedural safeguards that society has come to view as important to a fair and just adjudication of crime. These include limiting the timeframe in which conferences must be convened,<sup>94</sup> fully

*Control*, in FAMILY GROUP CONFERENCING AND JUVENILE JUSTICE, *supra* note 59, at 205 [hereinafter Braithwaite, *Thinking Harder*]. Therefore, a plea does not have to be entered with the court prior to convening a conference. M.P. Doolan, *Youth Justice—Legislation & Practice*, THE YOUTH COURT IN NEW ZEALAND: A NEW MODEL OF JUSTICE, *supra* note 47, at 22.

<sup>86</sup> LaPrairie, *Altering Course*, *supra* note 63, at \*9. Because the previous adversarial system relegated offenders to passive roles, often they would begin to view themselves "victims." McElrea, *A New Model*, *supra* note 47, at 12-13. See generally Hudson & Galaway, *supra* note 25, at 26-27 (summarizing Australian research on the effect of the previous system on youth offenders).

<sup>87</sup> LaPrairie, *Altering Course*, *supra* note 63, at \*15.

<sup>88</sup> Maxwell & Morris, *The New Zealand Model*, *supra* note 59, at 27. The CYPFA specifically states that the "family group conference may regulate its procedure in such manner as it thinks fit." CYPFA § 256(1).

<sup>89</sup> Braithwaite, *Thinking Harder*, *supra* note 85, at 205.

<sup>90</sup> Wundersitz & Hetzel, *supra* note 26, at 127-28.

<sup>91</sup> *Id.* at 128.

<sup>92</sup> See Wundersitz & Hetzel, *supra* note 26, at 129.

<sup>93</sup> See Maxwell & Morris, *The New Zealand Model*, *supra* note 59, at 17; see Wundersitz & Hetzel, *supra* note 26, at 114.

<sup>94</sup> Two of the acts require that conferences be convened within a reasonable amount of time and that they be completed within a certain timeframe. See CYPFA § 249(1)-(5) (providing that conferences must be convened within seven to 21 days depending on the circumstances) and CYPFA § 249(6) (requiring that conferences be completed within 7 days); N.S.W. Act § 43 (providing that conferences must be convened 21 days after referral to the Youth Justice Coordinator) and N.S.W. Act § 48(7) (requiring that conferences be completed within 7 days). For further discussion of these provisions, see Gabrielle Maxwell & Allison Morris, *Research on Family Group Conferences with Young Offenders in New Zealand*, in FAMILY GROUP CONFERENCES: PERSPECTIVES ON POLICY AND PRACTICE, *supra* note 26, at 96-99 [hereinafter Maxwell & Morris, *Research*].

informing offenders about the process,<sup>95</sup> and providing offenders with the right to consult an attorney or have one present at conferences.<sup>96</sup>

The flexible conference format can also be adapted to include culturally significant aspects, such as an opening prayer.<sup>97</sup> Such cultural empathy facilitates the reintegrative process for offenders.<sup>98</sup>

### 3. Conference "Outcomes" Promote Accountability

Although participation in the conferencing process is the first step toward accountability, conferencing is also designed to ensure that offenders recognize that their actions have consequences.<sup>99</sup> Therefore, the Acts provide that conference members will agree on outcomes, which are typically tasks offenders must complete in order for their offenses to be set aside.<sup>100</sup> When offenders and conference members collectively participate in the process of agreeing to an outcome, the conciliatory goal of conferencing is realized.<sup>101</sup> In addition, providing offenders with an opportunity to follow through on the outcome helps them to achieve accountability.<sup>102</sup>

To achieve conciliation, all of the Acts grant discretion to conference members to agree to outcomes and formulate plans for offenders.<sup>103</sup> Outcomes must be in accordance with the purposes of the Acts<sup>104</sup> and

<sup>95</sup> Two of the Acts specifically require a full explanation of the process and offenders' rights. CYPFA §§ 215-20; N.S.W. Act § 39(1).

<sup>96</sup> CYPFA § 324(3)(a); S. Austl. Act § 11(4); N.S.W. Act § 47(1)(f); see McElrea, *A New Model*, *supra* note 47, at 12-13.

<sup>97</sup> CYPFA § 250(c). The format of conferences must include any culturally significant aspects as requested by offenders or their families, such as holding an opening prayer. Maxwell & Morris, *The New Zealand Model*, *supra* note 59, at 28.

<sup>98</sup> Because the conferencing model in New Zealand was greatly influenced by the needs of the indigenous people of that country, recognizing and facilitating the cultural ties to offenders' families' and tribes were included as principle purposes of the CYPFA. CYPFA § 5(a) and (b). For example, in the FGC model, attempts are made to pair Maori young people with Youth Justice Coordinators of Maori descent. Maxwell & Morris, *The New Zealand Model*, *supra* note 59, at 20.

<sup>99</sup> See S. Austl. Act § 3; Wundersitz & Hetzel, *supra* note 26, at 116; McElrea, *A New Model*, *supra* note 47, at 7.

<sup>100</sup> CYPFA § 260; S. Austl. Act § 12; N.S.W. Act § 52. The tasks the conference participants agree to are variously referred to as "plans," "undertakings," and "outcomes." For the purposes of this Comment, they will be referred to as "outcomes."

<sup>101</sup> Wundersitz & Hetzel, *supra* note 26, at 131.

<sup>102</sup> *Id.*

<sup>103</sup> Both the CYPFA and the New South Wales Act grant discretion to the group, but also make suggestions as to appropriate outcomes. CYPFA § 260(1) and (3); N.S.W. Act § 52(1) and (5). The South Australia Act appears to limit the choices of outcomes. S. Austl. Act § 12(1).

<sup>104</sup> CYPFA § 260(2) (requiring conference members to have regard to the purposes of the Act set forth in § 208); S. Austl. Act § 3(2)(a); N.S.W. Act § 52(6). South Australia was the first to require those exercising power under the legislation (including conference participants) to consider the deterring effect of the agreed upon outcome. S. Austl. Act § 3(2a); Wundersitz, *supra* note 45, at 89. It also is the only Act to

offenders must voluntarily agree to perform them.<sup>105</sup> Where stigmatic punishment has the effect of ostracizing offenders from communities,<sup>106</sup> performing outcomes that are agreed upon through the conciliatory process satisfies all those who participated in the conference and helps offenders to make amends, which will lead to their reintegration.<sup>107</sup>

Conference members typically will create outcomes that are appropriate for the crime or are culturally significant.<sup>108</sup> Common outcomes include reparations, apology,<sup>109</sup> or community service.<sup>110</sup> Outcomes can also involve further proceedings or restrictions on personal liberties.<sup>111</sup> Allowing conference members to determine the outcome of an offense is central to the concept of Restorative Justice. It lessens the need for crime-based sentencing<sup>112</sup> and age-based sentencing<sup>113</sup> and returns control to those most affected by the offense.

require that consideration be given to sentences imposed for comparable offences by the Youth Court. S. Austl. Act § 12(2). The New South Wales Act requires that outcomes are not "more severe" than those that might have been imposed by the Youth Court. N.S.W. Act § 52(6)(a).

<sup>105</sup> The CYPFA does not specifically state what constitutes "agreement" by the group. However, it appears as if all conference members must agree. Commentaries indicate that families actually decide the outcome. Maxwell & Morris, *The New Zealand Model*, *supra* note 59, at 28. In South Australia, a decision by the conference is not valid unless offenders and police agree to the decision. S. Austl. Act § 11(3). The New South Wales Act requires agreement by offenders and victims (when victims are in attendance). N.S.W. Act § 52(3).

<sup>106</sup> The CYPFA and the New South Wales Act encourage conference members to create outcomes that use the "least restrictive means." CYPFA § 208(f)(ii); N.S.W. Act § 34(b)(ii).

<sup>107</sup> See Umbreit & Zehr, *supra* note 21, at 25.

<sup>108</sup> Wundersitz & Hetzel, *supra* note 26, at 137 (describing conferences in traditional communities in which the outcomes for property damage and theft often include some element of community service or compensation; whereas outcomes for substance abuse included going on a camel trek or living for a time in one of the homelands under adult supervision).

<sup>109</sup> McElrea, *A New Model*, *supra* note 47, at 8. Apology has been noted to be an integral part of the Restorative Justice process. See Deborah L. Levi, *The Role of Apology in Mediation*, 72 N.Y.U. L. REV. 1165 (1997); see generally John O. Haley, *The Implications of Apology*, 20 L. & SOC. REV. 499 (1986) (examining the role of apology in Japanese culture and its impact on crime).

<sup>110</sup> CYPFA § 260(3); S. Austl. Act § 12(1); N.S.W. Act § 52(5). In South Australia, the majority of outcomes involved making reparations to victims, but not all required monetary compensation. Wundersitz & Hetzel, *supra* note 26, at 131-32. Other outcomes have included attending counseling and participating in training programs. *Id.* at 132.

<sup>111</sup> The South Australia Act allows for the conference members to agree that a "formal caution" may be entered with the Youth Court, which is a warning against future offending that becomes part of the Court record. S. Austl. Act § 12(1)(a) and (3). The CYPFA is the only to suggest that a conference may recommend that proceedings against offenders should be continued. CYPFA § 260(3)(a).

<sup>112</sup> The CYPFA provides that all offenses can be referred to conferencing except murder and manslaughter. CYPFA § 272(3)(a) and (b). South Australia requires offenders found guilty of murder to be sentenced for life. S. Austl. Act § 29(4). The New South Wales Act differs in that it is more restrictive of the types of crimes to be dealt with by conferencing. It excepts from coverage crimes that result in the death of a person, stalking, indecent behavior, sexual assault or attempted sexual assault, and some drug-related crimes. N.S.W. Act § 8(2)(c),(d) and (f).

<sup>113</sup> Moore, *supra* note 8, at 21. The South Australia Act allows for juveniles to be tried as adults in some circumstances, particularly when considered in light of the severity of the offense and past offenses.

Once the group has agreed to an outcome, the agency that conducts conferences and the court review it.<sup>114</sup> Follow-up provisions are also agreed upon during the conference to ensure offenders have completed their tasks.<sup>115</sup> In the event that conference members fail to reach an agreement, the matter is referred back to the Youth Court.<sup>116</sup>

### *B. How Pardoning by Victims is Achieved*

The New Zealand Act and the New South Wales Act best recognize the importance of victims' involvement, not only in terms of the impact their presence has on offenders, but also in terms of the impact on victims themselves.<sup>117</sup> Restorative Justice attempts to rectify how the traditional state-centered model of justice relegates victims to a passive, ineffectual role by actively involving them in the adjudication of the crime.<sup>118</sup> When victims are made part of the communities that take affirmative roles in reaching conciliation on the outcome of the crime, victims are empowered.<sup>119</sup>

The New Zealand and New South Wales Acts specifically provide for victims to attend<sup>120</sup> and have an influential role in the process.<sup>121</sup> If victims are unable or unwilling to attend, they can elect "proxies" to attend to make

S. Austl. Act § 17. It also allows for juveniles to be sentenced as adults. S. Austl. Act § 29.

<sup>114</sup> CYPFA § 258(b); S. Austl. Act § 12; N.S.W. Act § 52.

<sup>115</sup> N.S.W. § 52(6)(d). In the South Australia model, the follow-up varies depending on the task. The Act requires that if offenders are to pay compensation to victims, or agree to community work, the registrar of the court must be notified and the court will monitor compliance. Wundersitz & Hetzel, *supra* note 26, at 133. For other types of tasks, "supervisors" are appointed who are usually either friends or relatives of offenders. *Id.*, at 132. Supervisors are responsible for notifying the conference coordinators that the task has been completed or if compliance is threatened. *Id.* If tasks are not completed, a conference is not reconvened. Instead, the coordinator will make a determination as to the next appropriate step. *Id.* at 133. This may include the police laying a charge with the Youth Court. S. Austl. Act § 12(8)(c).

<sup>116</sup> CYPFA § 264; S. Austl. Act § 11(2) and (5); N.S.W. Act § 52(2) and (3).

<sup>117</sup> According to the New South Wales Act, a principle for determining the measures used to deal with juvenile crimes includes "enhanc[ing] the rights and place of victims in the juvenile justice process." N.S.W. § 34(a)(iv). The New Zealand Act also recognizes the participation of victims. CYPFA § 208(g). The South Australia Act places the least importance on the impact of crime on victims by only recognizing their need for compensation. S. Austl. Act § 3(3)(a). However, in practice, coordinators recognize the importance of their participation and they are encouraged to attend. Wundersitz & Hetzel, *supra* note 26, at 122.

<sup>118</sup> Bazemore, *supra* note 10, at 46-47.

<sup>119</sup> NEW SOUTH WALES REFORM COMMISSION, DISCUSSION PAPER 33: SENTENCING ¶ 9.92 (Apr. 1996); available at <<http://www.austlii.edu.au/do/disp.pl/au>>.

<sup>120</sup> CYPFA § 251(1)(f); N.S.W. Act § 47(1)(i). The South Australia Act merely provides that the conference coordinator must notify victims as to the outcome of the conference if they wish to be informed. S. Austl. Act § 12(11). However, efforts are made to elicit the participation of victims, including encouraging "corporate victims" to attend. See Wundersitz & Hetzel, *supra* note 26, at 123.

<sup>121</sup> The New South Wales Act most specifically promotes the involvement of victims. It requires the victims' consent (if they attend) to the outcome of the conference in order for an agreement to take effect. N.S.W. Act § 52(3). The CYPFA provides that even if victims cannot attend the conference, their views are to be "made known at the conference." CYPFA § 254.



their wishes known.<sup>122</sup> The Acts also provide for support persons for victims to be present.<sup>123</sup>

The greatest benefit to victims of the conferencing model is that it provides them with the opportunity to confront offenders, which aids in reducing the residual anger and trauma caused by the crime.<sup>124</sup> Other benefits may include reconciling with offenders if they are in continuing relationships and the possibility of being compensated.<sup>125</sup>

### C. *How Offenders are Reintegrated into Families and Communities*

The conferencing model attempts to return control of crime to families and communities.<sup>126</sup> The Acts affirm not only that families have a responsibility to and for offenders, but also that they have the authority to be involved in the consequences of the offense.<sup>127</sup> The result is that families are strengthened<sup>128</sup> and, in turn, communities are strengthened.<sup>129</sup> Therefore, all of the Acts stress the involvement and responsibility of families and extended families,<sup>130</sup> and, through their involvement, the reintegration of youths into these memberships.

As an illustration of the importance of family, all of the Acts require that prior to conducting conferences, facilitators take reasonable steps to consult with offenders' families and to give effect to their wishes.<sup>131</sup> This

<sup>122</sup> CYPFA § 251(f); N.S.W. Act § 47(1)(i); see Wundersitz & Hetzel, *supra* note 26, at 122-23 (noting that victims are encouraged to nominate a friend or supporter to attend on their behalf).

<sup>123</sup> S. Austl. Act § 10(2)(c); N.S.W. Act § 47(1)(i). The CYPFA did not originally provide for a victim-support person to be present. As a result of criticisms, the CYPFA was amended in 1994 to include such a provision. Stewart, *supra* note 64, at 68. This omission was blamed as the reason that only about half of the victims had actually been attending conferences in New Zealand and that only half of those who did attend were satisfied with the process prior to the amendment. See NEW SOUTH WALES REFORM COMMISSION, *supra* note 119, at ¶ 9.77.

<sup>124</sup> Bakker, *supra* note 20, at 1504-05.

<sup>125</sup> NEW SOUTH WALES REFORM COMMISSION, *supra* note 119, at ¶ 9.67.

<sup>126</sup> See Bill Atkin, *New Zealand: 1992 Controversy Surrounds Policies on Children*, 32 U. LOUISVILLE J. FAM. L. 377, 377-78 (1994); see also Joe Hudson et al., *Introduction, in FAMILY GROUP CONFERENCES: PERSPECTIVES ON POLICY AND PRACTICE*, *supra* note 26, at 2 ("[T]he development of FGCs reflects this desire to make dramatic changes and represents a conscious attempt to collaborate with families when the state becomes involved in the lives of their children.").

<sup>127</sup> CYPFA § 208(c)(ii) and (d); N.S.W. Act § 7(f); McElrea, *A New Model*, *supra* note 47, at 6. The South Australia Act is the least assertive of families' rights by merely stating that parents are invited, but not required to attend. S. Austl. Act § 10(2)(c).

<sup>128</sup> NEW SOUTH WALES REFORM COMMISSION, *supra* note 119, at ¶ 9.94; Umbreit & Zehr, *supra* note 24, at 25 ("[Conferencing] acknowledges and regularizes the important role of the family in a juvenile offender's life.").

<sup>129</sup> See Bazemore, *supra* note 10, at 48-49.

<sup>130</sup> CYPFA § 251; S. Austl. Act § 3(3)(b) and (c); N.S.W. Act § 7(f) and (g).

<sup>131</sup> CYPFA § 250; S. Austl. Act § 10(2)(d); N.S.W. Act § 7(e) and (f); Maxwell & Morris, *The New Zealand Model*, *supra* note 59, at 22.

recognition affirms the authority of families to retain some control and to take responsibility for offenders' actions.<sup>132</sup> By including the extended family in the conference, the Acts attempt to spread the responsibility beyond the immediate family and, in part, recognize the social structure of indigenous families.<sup>133</sup> It also creates a sense of "peer pressure" within families for members to take responsibility for the actions of offenders.<sup>134</sup> The process strengthens the nuclear family, yet also provides support "around its weaknesses" from a wider community.<sup>135</sup>

Although the Acts primarily focus on the involvement of offenders, their families, and victims in the conferencing model, the drafters also considered the effect that the model and its administration would have on the community as a whole.<sup>136</sup> Communities are strengthened through conciliation. Once the harms of crime have been addressed through accepting accountability and receiving forgiveness from victims, offenders can be reintegrated into their families and communities and community harmony can be restored.<sup>137</sup>

#### IV. ADOPTING THE CONFERENCING MODEL IN THE UNITED STATES

Determining whether a model of justice is successful is dependent on measuring it against its identified objectives.<sup>138</sup> In the United States, society has historically identified that the primary goals of justice are

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<sup>132</sup> McElrea, *A New Model*, *supra* note 47, at 6.

<sup>133</sup> Stewart, *supra* note 64, at 67.

<sup>134</sup> McElrea, *A New Model*, *supra* note 47, at 6.

<sup>135</sup> John Braithwaite, *What Is to Be Done About Criminal Justice?*, in *THE YOUTH COURT IN NEW ZEALAND: A NEW MODEL OF JUSTICE*, *supra* note 46, at 39.

<sup>136</sup> The change to the structure of the juvenile justice system and where conferencing fit into that structure was an important consideration for the New Zealand and South Australian legislatures. Wundersitz, *supra* note 45, at 95. In both New Zealand and South Australia, the conferences are funded and administered by state entities. However, a primary difference between the functioning of the conferences is the placement of the conferencing administration within the system. In New Zealand, the conferences are administered by the Department of Social Welfare. Wundersitz, *supra* note 45, at 95. For New Zealand, because the operation of the CYPFA governs both youth criminal cases and child welfare and protection cases, placing the administration of the conferences under the authority of a welfare agency best effected its purposes of putting the welfare of youths foremost and providing greater access to services. *Id.* at 96. In South Australia, conferencing is administered by the Courts Administration Authority and overseen by the senior judge of the Youth Court. *Id.* at 95. This structure is a result of the Act's focus on justice principles; the court was perceived to be in a better position to confer independence and neutrality on the conferencing system and to provide better accountability to society. *Id.* at 90.

<sup>137</sup> Wundersitz & Hetzel, *supra* note 26, at 113-14. The Acts attempt to balance the need for reintegrating offenders and promoting community safety. CYPFA § 208(a) and (d); S. Austl. Act § 3(2)(c); N.S.W. Act § 7(g).

<sup>138</sup> See Hassal, *supra* note 26, at 30.

rehabilitation, deterrence, retribution, and incapacitation.<sup>139</sup> Because these are often conflicting goals,<sup>140</sup> it is unrealistic to expect that any system will achieve success in all areas.<sup>141</sup> Because the conferencing model identifies restoration as a single overarching goal, it will help create a vision that has the potential to end the cycle of crime in the United States.<sup>142</sup> Furthermore, the adaptability of the model is evidenced by its widespread use in a variety of cultures and justice systems.<sup>143</sup> The successful implementation of this model in the United States can be achieved by enacting legislation<sup>144</sup> that will encourage a shift away from the current retributive style of justice to one that adopts the crucial aspects of the New Zealand and Australian acts:<sup>145</sup> the commitment to the conferencing model, the measures to ensure the accountability of offenders, the recognition of the need to provide support for victims, and the recognition that crime is a community problem.

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<sup>139</sup> Van Ness, *supra* note 16, at 265.

<sup>140</sup> O'Connor & Trest, *supra* note 6, at 1300.

<sup>141</sup> No justice system will reach the utopia of a crime-free society. Therefore, the conferencing model is not intended to be a "functional expedient." Hassal, *supra* note 26, at 30. "It is founded not only on the expectation that it would work better, but on a belief . . . [that] the family as a whole should have the opportunity to determine family matters." *Id.*

<sup>142</sup> VanNess, *supra* note 16, at 265. Dr. Mark Umbreit and Dr. Howard Zehr, two noted psychologists in the area of Restorative Justice and juvenile crime and prevention, claimed that the FGC model was "one of the most promising new interventions to emerge in North America, with great potential for restorative justice practice." Umbreit & Zehr, *supra* note 21, at 24.

<sup>143</sup> Moore, *supra* note 8, at 4, 20-21. See LaPrairie, *Conferencing in Aboriginal Communities*, *supra* note 13 for a discussion of "family circles" as an outgrowth of the aboriginal cultures in Canada. See also UMBREIT, *supra* note 14, at 5 (describing the use of Restorative Justice models in various European countries and Canada); see also Haley, *supra* note 13, at 366-67 (comparing aspects of Restorative Justice in Japanese culture that are evident in criminal justice system of other cultures, including New Zealand and Australia).

<sup>144</sup> Scholars suggest that the conferencing model would be adaptable to the United States' juvenile justice system. See Umbreit & Zehr, *supra* note 21. Although a form of Restorative Justice in the VOM programs has existed for over 20 years, there is a concern that this movement will not gain widespread public acceptance unless there is a basic shift in the power related to who controls and "owns" crime in society—the state or the individual citizen and local community. UMBREIT, *supra* note 14, at 162.

<sup>145</sup> Although the Acts are a remarkable achievement, this Comment asserts that none adequately incorporates all aspects of Restorative Justice. The New Zealand Act is the most detailed, yet its complexity would make it difficult to adopt in its totality. In contrast, the South Australia Act is not detailed enough. For example, it does not include some important structural components such as requiring that conferences be convened within a certain number of days. See *supra* note 95 and accompanying text. The New South Wales Act is the most promising, yet is too restrictive in the crimes that can be referred to conferencing. However, the flexibility of the model would allow policy choices as to the types of crimes that could be adjudicated through conferencing. See UMBREIT, *supra* note 14, at 160-62 (discussing applicability of current U.S. VOM programs to violent offenses).

### A. *Commitment to the Conferencing Model*

To ensure that the vision of Restorative Justice can become a reality requires a commitment. In order to perpetuate this vision, New Zealand and Australian societies have recognized the need for a legislative structure that includes a committed source of funding.<sup>146</sup> In contrast, the Restorative Justice models that do exist in the United States are typically promulgated through general statutory provisions for alternative dispute resolution<sup>147</sup> and funded through unpredictable sources.<sup>148</sup> In order for the conferencing model to be successful in the United States, it must be adopted with a commitment to Restorative Justice principles which includes providing more specific legislative endorsement and adequate funding for these programs.

#### 1. *Legislative Commitment to Conferencing*

Despite the lack of formal legislative structures, Restorative Justice models have become incorporated within the justice systems of many Western cultures.<sup>149</sup> However, as in New Zealand and Australia, legislation is needed in the United States to further promulgate Restorative Justice models, and specifically the conferencing model. Providing a statutory structure will create legislative inducements which will reduce barriers to the use of Restorative models, provide guidance and structure for such programs, and ensure protection of the rights of offenders and victims.

Although Restorative Justice has become more of a mainstream ideal in the United States,<sup>150</sup> promulgation of the model will require a basic shift as to society's understanding of the purpose of justice.<sup>151</sup> Enacting statutory endorsement for the conferencing model will legitimize the model for decision-makers and promulgate incorporation of the model into juvenile

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<sup>146</sup> Conferences are funded and administered by state entities. See *supra* note 136 for a description of the differing administrative structures for conferencing within the New Zealand and Australian justice systems.

<sup>147</sup> Chantilis, *supra* note 22, at 1023.

<sup>148</sup> Bakker, *supra* note 20, at 1485. A growing number are established and operated through governmental agencies. *Id.* For example, in Arizona, the State Attorney General's Office administers the Victim-Offender Mediation Program. See generally Diana R. Hegyi, *Victim Offender Mediation*, 33 ARIZ. ATT'Y 29 (1996).

<sup>149</sup> Daniel W. VanNess & Pat Nolan, *Legislating for Restorative Justice*, 10 REGENT U. L. REV. 53, 56-57 (1998).

<sup>150</sup> See *id.* at 54.

<sup>151</sup> McCold, *supra* note 9, at 86.

justice systems. At the same time, it will eliminate the legal and systemic barriers that are preventing such programs from fulfilling their potential.<sup>152</sup>

Providing for such consistency will also enhance the credibility for the model. For example, the New Zealand Act provides guidance for the conduct of conferences, the participants, timeframes for conducting conferences, recordkeeping, and the legal affect of the agreements reached.<sup>153</sup> Although the effectiveness of conferencing derives from its flexible structure, its incorporation into an existing justice system requires forethought, particularly to ensure that the necessary processes and resources are in place.<sup>154</sup>

Despite the shift away from a retributive style of justice, conferencing does not require relinquishing the rights that are considered basic to society,<sup>155</sup> although conferencing may protect them in a different form. Critics have raised the concern that the conferencing method, by circumventing the court system, may also result in bypassing many of the procedural safeguards that the courts provide.<sup>156</sup> The New Zealand and Australian Acts, in varying degrees, include many of the safeguards the court systems do, such as providing for a right to counsel.<sup>157</sup> Therefore, in order to gain widespread acceptance of the model in the United States, the legislation must include similar procedural safeguards.

Although the current VOM programs in the United States have processes in place in order to function, enacting more specific legislation regarding basic procedural and structural aspects of conferencing will increase their credibility as a viable alternative. As inconceivable as it is that a court system would be run without the enactment of rules and statutes, VOM programs are typically run without the benefit of such a structure. Adopting legislation that specifically endorses the conferencing model, as the most effective alternative to disposition of juvenile crime, will promote the Restorative Justice ideal in U.S. justice systems.

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<sup>152</sup> McConnell, *supra* note 22, at 436.

<sup>153</sup> VanNess & Nolan, *supra* note 149, at 62.

<sup>154</sup> *Id.* at 61.

<sup>155</sup> *Id.* at 64.

<sup>156</sup> See generally Kate Warner, *Family Group Conferences and the Rights of the Offender*, in FAMILY CONFERENCING AND JUVENILE JUSTICE: THE WAY FORWARD OR MISPLACED OPTIMISM?, *supra* note 45 (describing concerns about due process violations, pressures to plead guilty, power imbalances, disproportionate or inconsistent penalties, "net widening," double jeopardy, and sex discrimination).

<sup>157</sup> See *supra* note 94 for a discussion of some of the procedural safeguards provided for in the Acts.

## 2. *Financial Commitment to Conferencing*

Although conference funding is an important consideration, there is no indication that one style of administration or source of funding is desirable over another.<sup>158</sup> New Zealand and South Australia each aligned the administration of conferencing within the governmental entity identified as best able to effectuate the goals of the model.<sup>159</sup> Fundamentally, providing adequate resources for the conferencing model requires shifting the focus of funding from institutional placement to those costs associated with training and program operations.<sup>160</sup>

The New Zealand Act specifically recognizes the administrative needs of conferencing.<sup>161</sup> For example, it allows for the program director to provide financial assistance as necessary to give effect to an agreement resulting from a conference.<sup>162</sup> However, despite such language, reports from New Zealand and Australia indicate that their programs have already experienced some of the difficulties that can arise from inadequate funding—particularly in the areas of training coordinators,<sup>163</sup> staffing, and operating funds.<sup>164</sup>

In the United States, shifting to a Restorative Justice model at a time when welfare reform is on the national agenda could potentially be harmful if it is done without an understanding of the financial commitment involved. The temptation will be for government to continue to cut funding in welfare programs while shifting the financial burden to communities and families.<sup>165</sup> Such shortsighted funding considerations would vitiate the conferencing system and cause more harm to families and children.<sup>166</sup> Therefore, a long-term vision and commitment to Restorative Justice is necessary to ensure that the adequate financial support is in place.

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<sup>158</sup> See Wundersitz, *supra* note 45, at 95.

<sup>159</sup> See *supra* note 136 for a discussion of the administration of conferences in New Zealand and Australia. In New Zealand, conferences are administered by the Department of Social Welfare. In Australia, the Youth Courts administer conferencing.

<sup>160</sup> Allison Morris et al., *Concluding Thoughts*, in *FAMILY GROUP CONFERENCES: PERSPECTIVES ON POLICY AND PRACTICE*, *supra* note 26, at 231.

<sup>161</sup> CYPFA § 257 ("The Department [of Social Welfare] shall provide such administrative services as may be necessary to enable a family group conference to discharge its functions.").

<sup>162</sup> CYPFA § 269.

<sup>163</sup> In 1992, the Ministerial Review team for the Minister of Social Welfare conducted the first overarching review of the conferencing model in New Zealand. The team documented its finding in the Mason Report. For results of the report, see generally Atkin, *supra* note 126. Criticism of conferences in New Zealand was attributed to service delivery due to a lack of training rather than any defects in the provisions of the CYPFA. *Id.* at 387.

<sup>164</sup> See Wundersitz, *supra* note 45, at 98-99.

<sup>165</sup> Morris et al., *supra* note 160, at 231.

<sup>166</sup> *Id.*

### B. *Measures to Encourage Accountability of Offenders*

The trend toward a more retributive justice system has had the greatest impact on offenders. In addition to the societal and sociological pressures on youths today,<sup>167</sup> the current U.S. justice system perpetuates the demoralization of youths<sup>168</sup> without reducing crime.<sup>169</sup> New Zealand and Australia are attempting to reverse this trend by introducing a model of justice that diverts youths away from more traditional justice processes<sup>170</sup> and reconnects them with their families and communities. As compared to the VOM model, the conferencing model creates a setting that provides offenders with a greater opportunity to benefit from the process and take responsibility for their actions. The indications that conferencing is achieving this goal is illustrated by evidence that offenders are more likely to follow through on their agreements,<sup>171</sup> which may also lead to fewer instances of re-offending.<sup>172</sup>

Going beyond the typical VOM format by providing a support network for offenders of extended family members and others important to offenders will enhance the effectiveness of the process.<sup>173</sup> However, because of the large number of adults present, conference coordinators must

<sup>167</sup> O'Connor & Treat, *supra* note 6, at 1300.

<sup>168</sup> See OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, *supra* note 7, at 11 ("The criminal justice response criminalizes young people, solidifies in their minds the notion of their own pre-criminality."). Diversionary methods such as conferencing are intended to minimize the stigmatic effect that formal contact with the court system can have on first-time offenders. Statistics in the United States indicate that time spent in jail increases the risk of offenders reoffending once they are released to the community. David M. Altschuler, *Tough and Smart Juvenile Incarceration: Reintegrating Punishment, Deterrence, and Rehabilitation*, 14 ST. LOUIS U. PUB. L. REV. 217, 219 (1994).

<sup>169</sup> McCold, *supra* note 9, at 86.

<sup>170</sup> Kenneth Polk, *Family Conferencing: Theoretical and Evaluative Concerns*, in FAMILY CONFERENCING AND JUVENILE JUSTICE: THE WAY FORWARD OR MISPLACED OPTIMISM?, *supra* note 45, at 123.

<sup>171</sup> NEW SOUTH WALES REFORM COMMISSION, *supra* note 119, at ¶ 9.92. Research on a sampling of cases in New Zealand showed that tasks were completed within three to four months in 59% of cases and partially completed in 28%. In only 13% of cases, the tasks were largely uncompleted, which were mainly in cases in which youths had reoffended. Maxwell & Morris, *The New Zealand Model*, *supra* note 59, at 38.

<sup>172</sup> Haley, *supra* note 13, at 366 (noting that Restorative Justice models have been shown to have an affect on recidivism rates). Although conferencing was not necessarily created with the purpose of dealing with recidivists, it may have an effect on re-offending. Statistics on recidivism in New Zealand are difficult to analyze because no studies were done on recidivism rates prior to the enactment of the CYPFA. Maxwell & Morris, *Research*, *supra* note 94, at 100. However, in New Zealand, approximately 40% of offenders had not been reconvicted four years after their conference. *Id.* at 106-08.

<sup>173</sup> In the conferencing process, shame spreads among all of the conference participants and leads to reintegrative shaming that can repair bonds between individuals because "when we see signs of shame and embarrassment in others, we are able to recognize them as human beings like ourselves, no matter the language, cultural setting, or context." Scheff, *supra* note 35. Conferencing focuses on multiple goals for the outcome for the case, rather than merely negotiating a restitution agreement. Umbreit & Zehr, *supra* note 14, at 25.

ensure offenders are not overpowered.<sup>174</sup> Therefore, conference coordinators must have the discretion to create an environment in which offenders feel safe enough to actively participate;<sup>175</sup> this may include preventing anyone from attending who might be a disruptive influence.

Participation in conferencing must be voluntary to ensure justice is better served and provisions must be in place to prevent the process from becoming coercive. Conferencing is ineffective if offenders believe they are innocent or blameless.<sup>176</sup> However, critics point out that requiring a guilty plea prior to allowing offenders to have the option of conferencing may be coercive in itself.<sup>177</sup> Therefore, including many of the procedural safeguards set forth in the Acts<sup>178</sup> and including the New Zealand provision of not requiring an entry of a plea prior to participation in a conference,<sup>179</sup> will better facilitate offenders' accountability.

Cultural sensitivity is also an important aspect of the model. Because minorities are also disproportionately represented in the U.S. justice system,<sup>180</sup> failing to address fundamental issues of equality may hinder the positive effects of conferencing.<sup>181</sup> Therefore, provisions must be made to allow individuals to attend who are significant to offenders and their families. In addition, conference coordinators must be granted the flexibility to include aspects that are culturally and religiously significant to the attendees.<sup>182</sup>

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<sup>174</sup> Wundersitz & Hetzel, *supra* note 26, at 131. The Mason Report raised concerns that the CYPFA might fail to protect the interests of offenders because of its family-centered focus. See generally Atkin, *supra* note 126. Because of the large number of individuals, particularly adults, who might participate in the conference, it was noted that agreements by offenders may be coerced rather than negotiated. However, the report concluded that it was not necessary to backtrack on from the Act's core "family" focus, but just to ensure that its principles are met. *Id.* at 378.

<sup>175</sup> Umbreit & Stacey, *supra* note 82, at 34. In particular, police officers that attend conferences must be trained to suspend their normally authoritarian roles. *Id.* at 36.

<sup>176</sup> Braithwaite, *Thinking Harder*, *supra* note 85, at 205.

<sup>177</sup> A criticism of diversionary methods, such as conferencing, is that although participation is voluntary, participation (and a guilty plea) may be coerced by the threat of going to court. Braithwaite, an expert in Restorative Justice models, suggests that consideration be given to establishing different culpability levels, such as "declining to deny" and "taking some responsibility," in order to ensure that guilt is not coerced. Braithwaite, *Thinking Harder*, *supra* note 85, at 205.

<sup>178</sup> See *supra* note 94, describing some of the procedural safeguards provided for in the Acts.

<sup>179</sup> See *supra* note 85, describing the CYPFA provision that allows offenders the conference option if they decline to deny the allegations.

<sup>180</sup> MICHAEL A. JONES & BARRY KRISBERG, *IMAGES AND REALITY: JUVENILE CRIME, YOUTH VIOLENCE AND PUBLIC POLICY* 30-31 (Joe Hudson et al. eds., 1996).

<sup>181</sup> Polk, *supra* note 170, at 138. Research conducted by Maori indicated that culturally inappropriate processes took place during conferences, which were considered to be the result of "ignorance of the Act, a dearth of resources and mismanagement." Maxwell & Morris, *The New Zealand Model*, *supra* note 59, at 37.

<sup>182</sup> Hassal, *supra* note 26, at 31 ("[Conferences], through taking place in a familiar territory, in familiar language and style and with familiar people may be more meaningful to all the participants."). Although research indicates some difficulties in New Zealand with successfully making conferences culturally sensitive,



Because outcomes are determined by a larger group of people who are directly affected by the crime, offenders are more likely to accept the consequences of their actions and follow through on their outcomes.<sup>183</sup> Conferences in New Zealand and Australia typically result in outcomes that involve performing community service or making restitution as opposed to custodial placements.<sup>184</sup> Contrary to the perception that conferencing is "soft" on crime,<sup>185</sup> such outcomes better achieve the goals of a justice system.<sup>186</sup> In order to take advantage of the conferencing alternative, offenders must face all who were harmed by their actions, accept responsibility, and make amends rather than passively accepting punishment from an impersonal state system.<sup>187</sup>

Restorative justice models have the potential to correct criminal behavior in juveniles through accountability, repentance, and making active reparations. They achieve this purpose through a conciliatory model that can adapt to offenders' individual situations and cultural identities. The conferencing model has the potential to have an even greater affect than VOM models because it confronts offenders with the realization that their

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the flexibility of the conference process provides for a great potential of coping with cultural diversity. Maxwell & Morris, *Research*, *supra* note 94, at 96. However, the recognition of cultural aspects must go beyond mere tokenism. Maxwell & Morris, *The New Zealand Model*, *supra* note 59, at 36.

<sup>183</sup> McElrea, *A Model for Adults*, *supra* note 46, at 81 ("It is harder for an offender to confront his or her victim than to stand up in court and accept punishment."). Critics raise the concern that having conference members determine outcomes will result in disparate sanctions. However, Restorative justice proponents consider that proportionality and fairness are less important than reconciliation—as long as victims and offenders believe the outcomes are fair. "Fairness is not uniformity, but satisfaction." Hudson & Galaway, *supra* note 25, at 13. Furthermore, research from New Zealand indicates that conference outcomes are consistent to those imposed by courts in that offense-related factors typically considered by courts, such as seriousness of the offense, number of offenses and prior history were proportional to outcomes agreed upon in conferences. Maxwell & Morris, *Research*, *supra* note 94, at 89-90.

<sup>184</sup> Maxwell & Morris, *Research*, *supra* note 94, at 90-91. Research on outcomes in 1993 showed that 74% involved restitution or community service. *Id.* at 91.

<sup>185</sup> Critics argue that the low instances of "tough" measures, such as incarceration, prove that conferencing is too "soft" on crime. However, the fact that such measures are not often used does not lead to the conclusion that conferencing is necessarily soft on crime. *Id.* at 91 ("[W]hat, if anything, would have been achieved by a greater use of the 'tough' options of custody and residential placement. Research generally indicates that these more severe penalties do not deter.").

<sup>186</sup> One legal scholar described the fundamental difference in how Restorative Justice models and retributive models measure their success:

[T]he retributive model gives priority to punishment through incarceration as the primary means of sanctioning offenders for violations against the state. Thus, success in juvenile court seems to be measured by how much punishment is inflicted. . . . Restorative justice values define accountability for crime as the obligation of offenders to make amends to victims rather than to receive punishment by the state. Performance objectives in Restorative Justice are driven by . . . the need for offenders to understand the consequences of their actions and to actively make amends for the harm done.

Bazemore, *supra* note 10, at 50.

<sup>187</sup> Scheff, *supra* note 35.

actions not only harm victims, but also their families and others in the community with whom they can identify.

### C. *Recognition of the Need for Victim Support*

Many cultures, including the United States, have experienced victims' rights movements.<sup>188</sup> Advocates maintain that a state-centered justice system fails to address the needs of victims.<sup>189</sup> Attempts in the United States to address victims' issues through the VOM process have had some success.<sup>190</sup> Victims' involvement in the VOM process is integral—not only for the effect it has on offenders,<sup>191</sup> but also to begin the healing process for victims.<sup>192</sup> Because conferencing provides greater support for victims, it can potentially have a greater positive effect on victims than other models.<sup>193</sup>

When victims are involved in the conferencing model, they have the opportunity to view offenders as individuals.<sup>194</sup> Often, victims will more readily pardon offenders when they see that family members are also willing to take responsibility for offenders' behavior.<sup>195</sup> Studies have shown that victims typically welcome the opportunity to attend conferences or would like to attend.<sup>196</sup> Victims' motivations for attending are typically not vengeful.<sup>197</sup> Rather, they are more concerned with reparation.<sup>198</sup> Because

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<sup>188</sup> Bakker, *supra* note 20, at 1494-96; see Daniel W. VanNess, *Restorative Justice and International Human Rights*, in *RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES*, *supra* note 9, at 20 (describing the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power that was adopted by the United Nations in 1985). Victims' rights proponents in the United States advocate that with the growing popularity of VOM programs, now is the time to recognize mediation as a basic right of any crime victim in any community. UMBREIT, *supra* note 14, at 162.

<sup>189</sup> Bazemore, *supra* note 10, at 46. Restorative Justice advocates criticize the current retributive style of justice in the United States as focusing on the actions of the offender and removing victims to passive roles. *Id.* at 46-47.

<sup>190</sup> UMBREIT, *supra* note 14, at 154.

<sup>191</sup> See *supra* Part III.B for a discussion of the role of victims in the conferencing process.

<sup>192</sup> Conferencing provides victims an opportunity to express what impact the crime had upon their lives, to receive answers to any lingering questions about the incident, and to participate in holding offenders accountable for their actions. Umbreit & Zehr, *supra* note 21, at 25.

<sup>193</sup> Bazemore, *supra* note 10, at 46.

<sup>194</sup> McElrea, *A New Model*, *supra* note 47, at 8.

<sup>195</sup> See *id.*

<sup>196</sup> Maxwell & Morris, *The New Zealand Model*, *supra* note 59, at 25. In South Australia, preliminary statistics show that 75 to 80% of conferences involving a victim-based crime had at least one victim present. Wundersitz & Hetzel, *supra* note 26, at 123.

<sup>197</sup> Moore, *supra* note 8, at 17 ("[Victims] may feel vindictive, malicious, and spiteful towards an offender when contemplating the offender's actions from a distance; they are far less likely to feel this way when faced with the offender as a real human being in a collective social setting."). Reasons given by victims for attending conferences included considerations for their own interests, a willingness to help support offenders, and a sense of duty. Maxwell & Morris, *The New Zealand Model*, *supra* note 59, at 26.

<sup>198</sup> Moore, *supra* note 8, at 16. However, victims' reactions and satisfaction have largely depended

they are involved in working through the effects of the crime with a larger group of people, they also may take active roles in following up on the outcomes of the conferences.<sup>199</sup>

Because a large number of conference members attend to provide support for offenders, providing support persons for victims is equally as important. Support persons prevent victims from feeling outnumbered at conferences. Providing for such support also implicitly recognizes how deeply crime affects them and that they also need community support and recognition.<sup>200</sup>

Although VOM models have made great strides in reducing the disenfranchising effect that retributive styles of justice have on victims of crime, conferencing more effectively accomplishes the goals of Restorative Justice for victims. The conferencing format allows victims to confront offenders and see them as part of a community of people who are willing to accept responsibility, it recognizes their need for support persons, and it involves them in the community of those who take responsibility for offenders. By participating in this process, victims are better able to work through the harmful effects of crime.

#### D. *Recognition of Crime as a Community Problem*

The promulgation of the retributive model of justice in the United States is based on the false assumption that punishment and incarceration alone will protect communities.<sup>201</sup> In reality, the United States' version of "getting tough" is not working.<sup>202</sup> Although it may satisfy society's need for retribution to some extent, the goal of any justice system should, more importantly, be the control and prevention of crime. Conferencing achieves

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on how offenders approach the process. Because the success of the conferencing is based on offenders accepting responsibility for their actions, victims will not receive the benefit of the conferencing if offenders do not show remorse. Braithwaite, *Thinking Harder*, *supra* note 85, at 205.

<sup>199</sup> See McElrea, *A New Model*, *supra* note 47, at 8; see also Maxwell & Morris, *The New Zealand Model*, *supra* note 59, at 29.

<sup>200</sup> LaPrairie, *Altering Course*, *supra* note 63, at \*32. These efforts appear to be successful in South Australia. A 1995 study reported that 93% of victims contacted reported that they found participation in the conferences helpful. Wundersitz & Hetzel, *supra* note 26, at 137.

<sup>201</sup> McCold, *supra* note 9, at 86.

<sup>202</sup> See Bakker, *supra* note 20, at 1491-94, describing the "failure of the U.S. corrections system as illustrated by overburdening of courts, rising incarceration rates, high recidivism rates, and high costs of housing inmates." America incarcerates a greater percentage of its citizens than does any other nation in the world—with little effect on crime rates. JONES & KRISBERG, *supra* note 180, at 5. There are three times as many people in prison today as there were in the 1960s, but the rate of violent crime has increased by more than 500%. *Kids Who Commit Crimes*, *supra* note 4, at 11.

this goal by building safe and strong communities that can resist crime.<sup>203</sup> Even with the advent of VOM programs, few models in the United States have successfully incorporated the final community-focused aspect of the Restorative Justice model.<sup>204</sup> Promulgating the conferencing model will successfully complete the Restorative Justice cycle by fostering reintegration of offenders back into communities and, in turn, strengthening communities.

Communities are also victimized by crime.<sup>205</sup> They look to the criminal justice system for safety, justice, and crime prevention.<sup>206</sup> Restorative Justice addresses these concerns on a micro level by responding to specific offenses and providing for sanctions. It also works on a macro level by resolving conflicts that can lead to crime and breaking the cycle of violence.<sup>207</sup> In order for such a model to be successful, communities must actively participate in shouldering the responsibility for crime.<sup>208</sup>

The community of individuals that should be involved in conferencing is the "community of care" that surrounds offenders and victims.<sup>209</sup> Participation of community members will vary according to the harm inflicted and the nature of the relationship between offenders and victims.<sup>210</sup> In order to perpetuate community involvement, conference coordinators must consider the effect of the crime on the wider community and invite participants accordingly.

Conferencing empowers communities by providing them with a mechanism to take action against crime; this, in turn, aids communities in

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<sup>203</sup> VanNess, *supra* note 16, at 264.

<sup>204</sup> McCold, *supra* note 9, at 96 (stating that the New Zealand and Australian models are examples of models that have incorporated the community aspect of Restorative Justice). Indianapolis is the largest city in the United States to implement a conferencing model when it created Restorative Justice Conferences in 1998. A non-profit agency, the Hudson Institute, in cooperation with the local prosecutor's office, juvenile courts, police department, and the mayor's office operate the program. See Jacqueline L. Schneider, *Restorative Justice: A Program Description 2* (January 10, 1998) (unpublished program description) (on file with author). Bethlehem, Penn., Anoka, Minn., and South Burlington, Vt., have also implemented a conferencing model as a diversionary method of adjudicating juvenile offenses. *Id.* It is also being used in Dakota County, Minn., and the other six counties in its judicial district. H. Ted Rubin, *Dakota County, Minnesota: Repairing Harm and Holding Juveniles Accountable*, JUV. JUST. UPDATE, Aug./Sept. 1997, at 4. Real Justice, which purports to be based on the Wagga model developed in Australia, has copyrighted a conferencing model which it has been marketing in the United States. See Ted Wachtel, *Family Group Conferencing: Restorative Justice in Practice*, JUV. JUST. UPDATE, August/September 1995 at 1.

<sup>205</sup> McCold, *supra* note 9, at 93.

<sup>206</sup> *Id.* at 86.

<sup>207</sup> Bazemore, *supra* note 10, at 48.

<sup>208</sup> McCold, *supra* note 9, at 94. Involving communities in intervention efforts, such as prevention and risk management, will address community safety needs and reduce neighborhood fear. Bazemore, *supra* note 10, at 49, 54.

<sup>209</sup> LaPrairie, *Altering Course*, *supra* note 63, at \*36.

<sup>210</sup> McCold, *supra* note 9, at 91.

their recovery from the injuries caused by criminal conflict.<sup>211</sup> Such mechanisms turn community focus away from retribution, which fosters the feeling of community safety and ends the cycle of violence. Although accomplishing this goal may be difficult, involving more individuals in the justice process is a valuable beginning.<sup>212</sup>

## V. CONCLUSION

Restorative Justice directly addresses many societal concerns about crime. It brings the root causes of crime back into the control of communities and empowers them to deal with societal problems rather than abdicate responsibility to a state-controlled justice system to cure what ails them.<sup>213</sup> Restorative Justice offers an alternative vision of justice in which crime is considered "a serious form of interpersonal conflict involving concrete harms"<sup>214</sup> and provides those most directly affected by crime—offenders, victims, family members, and communities—with a tool to take action. By creating a conciliatory process in which those injured by crime can face each other and work through its effects, justice can be achieved.

No method is the panacea for eliminating juvenile crime and no one method alone will work. However, the United States will not be able to escape the cycle of violence that shrouds its current juvenile justice system unless it is provided with a mechanism that will empower it to constructively deal with crime.

The conferencing model, as a structure of the Restorative Justice ideal, provides the most promising method of incorporating a restorative vision into the U.S. juvenile justice system. Although other models are developing in the United States, the conferencing model most effectively incorporates all aspects of the ideal by including families and communities in the restorative process. As information is gathered from actual models, like those in New Zealand and Australia, the empirical evidence indicates that it is not only an ideal—it is working.<sup>215</sup>

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<sup>211</sup> *Id.* at 93.

<sup>212</sup> *Id.* at 90.

<sup>213</sup> *Id.* at 86.

<sup>214</sup> *Id.* at 86-87.

<sup>215</sup> Moore, *supra* note 8, at 20.